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RECONSTRUCTION OF FAMILY LAW IN INDONESIA (AN ANALYSIS OF *MAQASID AL-SYARIAH* ON ARTICLE 53 OF THE COMPILATION OF ISLAMIC LAW)

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Abstract: This study aims to analyze the provisions contained in article 53 of the Compilation of Islamic Law about marriages by pregnancy. The method used was qualitative (normative juridical). 7 Religious Affairs Offices in Tanah Datar Regency were involved in obtaining marriages by pregnancy data. The data collected were analyzed descriptively through the *maqasid al-sharia* approach. The finding of this study is that marriages by pregnancy continue to occur from year to year and some even increase and it can be ascertained that adultery continues to occur. Meanwhile, one of the main purposes of Islamic law is to maintain the offspring so that marriage is consecrated and adultery is forbidden. There is an assumption as if the main objective of the law which is to give benefit and refuse harm could not be achieved anymore because the existence of article 53 seems to be the cause of marriages by pregnancy.

Keywords: reconstruction, family law, *maqasid al syariah*, islamic law.

Introduction

One of the aims of a marriage is to fulfill the biological needs of human legally and respectfully [1]. It is because basically every normal human being wants his/her biological needs to be fulfilled. Some even claim that biological/sexual needs are primary human needs throughout the life that demand to be fulfilled. Even though biological needs are natural, there are norms to fulfill them, namely through marriage [2].

Even so, in subsequent developments, marriage institutions will face challenges; even their existence can be threatened when they face social problems that try to bother the institution's sacredness. One such problem is the emergence of pregnancy outside marriage. This problem has become increasingly complicated when it turns out that this case occurs a lot in the community social life nowadays [3].

The solution to eliminate social punishments in society is by letting these two teenagers get married. This no longer sees the readiness of both parties. The emphasis is nothing more than covering up the shame in society.

The issue of marriages by pregnancy is no longer a new problem. Since the time of *imam mazhab*, this has been discussed and the law has been determined. In Indonesia the provisions on marriages by pregnancy are explained in article 53 of the Compilation of Islamic Law, that:

1. A woman who is pregnant outside marriage can marry the man who impregnates her.

2. Marriage with a pregnant woman referred to in verse (1) can be held without waiting for the birth of the child first.
3. With the marriage committed when a woman is pregnant, no remarriage is needed after the child is born.

This article becomes a guideline for Marriage Registrar Employees to hold marriages for couples who are going to get married but their future wives are pregnant. This article also seems to be a solution for couples who have had premarital sexual relationships and caused unwanted pregnancies.

Based on a research conducted in 2013 at the Religious Affairs Offices of three sub-districts in Tanah Datar Regency, in 2011 there were 20 couples of marriages by pregnancy in 2 sub-districts, because one sub-district had not been well recorded, and in 2012 there were 37 pairs from three sub-districts [4]. After updating the data for the last 3 years from 2015-2017 in 7 Religious Affairs Offices in Tanah Datar Regency, there are 65 couples of marriages by pregnancy [5]. Perhaps this number is quite surprising for Tanah Datar Regency, which is populated by Muslims and is a *Minangkabau* customary center, with the traditional philosophy: *Adat Basandi Syara', Syara' Basandi Kitabullah*. This certainly needs serious attention, because the issue of marriages by pregnancy is a manifestation of adultery. What should be done is the adulterers are punished with *hadd*; however, with the provisions in article 53 of the Compilation of Islamic Law, it seems that the adulterers are legalized only by holding a marriage, so that all punishments for the perpetrators are vanished. Therefore, based on this data the writer tries to analyze the findings using the *maqasid al-sharia* approach.

Method

This research was done in 7 Religious Affairs Offices in Tanah Datar Regency. The considerations of the selection are: the Religious Affairs Offices with the widest area, the Religious Affairs Offices in the crossing area and the Religious Affairs Offices near the capital of the regency. This study used a qualitative approach [6] with a normative juridical method [7]. The types of data in this study are classified into primary data and secondary data. The method of data collection in this study was documentation. The data collection used a purposive sampling system. The technical analysis was *maqasid al-syariah* analysis. Testing the validity of research data was done by researchers using triangulation.

Results

Maqasid al-syariah

Wahbah al-Zuhaili defines the *maqashid syari'ah* by the meanings and purposes which are maintained by *syara'* in all its laws or most of its laws or the final purpose of the Sharia and the secrets laid by *syara'* on each of its laws. [8] The ultimate goal of establishing this Sharia is to maintain the benefit of humanity both in the world and in the hereafter. The benefit can be seen from two forms: Realizing the advantages, goodness and pleasure for human which is called *jalb al-manafi'*, and avoiding or preventing damage and badness which is often called *dar 'al-mafasid* [9]. To realize this benefit, the priorities need to be set so that they can complement each other.

The manifestations of these priorities are divided into three. First, *Dharuriyyat*, that is primary benefit, a benefit on which the human life toward religion and world depends. That is, with an estimate that if it does not exist, the benefit of the world will not be realized and become damaged and perish, and in the hereafter will not get happiness and even get a punishment. In this form of *dharuriyyat*, there are five principles that must be maintained, namely: religion, soul, mind, lineage and wealth [10]. Furthermore, Islam guarantees a *dharuriy* existence by allowing forbidden things in an emergency. Second, *Hajiyat*, that is a secondary benefit. This benefit does not reach the *dharury* level. This benefit is needed by humans to simplify life and eliminate difficulties and narrowness [11]. In *Hajiyat maslahat*, there are provisions regarding *rukhsah* (relief). As for worship, there is *rukhsah* for those who are *safar*, *jama'* and *qasar* prayers, allowance to break the fast for those who are *safar*

and sick. In everyday life, it is such the allowance to hunt animals, enjoy good food, drinks, clothing, shelter and vehicles, which are obtained in a *halal* way. Third, *Tahsiniyat*. *Tahsiniyat* benefit is the demand of *muru'ah* (moral), and it is intended for good and glory. If it does not exist, it does not damage or complicate human life. This benefit is needed as a tertiary need to improve the quality of human life [12]. The example of *tahsiniyat* benefit in the field of worship is: the Sharia to eliminating filth, purifying, covering *aurat*, wearing good and beautiful clothes to mosque, giving alms and doing other *sunnah*. Whereas the manifestation of the *tahsiniyat* benefit in everyday life is the existence of the manners of eating and drinking, avoiding extravagance and spree. While in *muamalah*, there is prohibition on conducting trade transactions against unclean objects, and the prohibition on killing children and women in warfare [13].

Of the three forms of benefits above, if the benefit of *dharuriy* is not achieved, then there will be damage and chaos in the life order, both related to the world and the hereafter. If the benefit of *Hajiyat* is not fulfilled, it will bring difficulties that will cause damage and chaos. If the benefit of *tahsiniyat* is not fulfilled, it will not threaten the existence of human, but it will eliminate the aesthetic values and the predicate of "civilized and cultured" from human life [14]

***Maqasid al-sharia* analysis of the provisions of marriages by pregnancy in article 53 of the Compilation of Islamic Law**

According to Ali ra., adultery is divided into two, namely:

1. Hidden adultery, adultery which requires a witness and he/she is the first accuser
2. Real adultery, proven by pregnancy or confession [15].

Marriage by pregnancy is the second category of adultery, and is one of the major sins whose culprit is sentenced to 100 lashes for those who are *ghairu muhsan* and stoning for those who are *muhsan*. As the word of Allah Swt in Surah al-Nur: 2

الرَّانِيَةُ وَالرَّانِي فَاجْلِدُوا كُلَّ وَاحِدٍ مِنْهُمَا مِائَةَ جَلْدَةٍ.....

"The [unmarried] woman or [unmarried] man found guilty of sexual intercourse - lash each one of them with a hundred lashes..."

The verse above explains that in this *surah* there is a definite law for adulterous women and adulterous men; that is 100 lashes if the mistake is proven according to the conditions. This provision must be carried out seriously. Adultery must be proven by four male witnesses, who indeed saw the sword enter into the scabbard while explaining who, when, and how or on the basis of the confession of the adulterers for four times [16].

If the conditions are fulfilled, then lashing can be carried out to the perpetrators. But in terms of this punishment, scholars differed on the issue of whether to add a sentence of exile for one year or not. The *Hanafiyyah* scholars stated that the punishment for exile was not as absolute as lashing; exile is carried out if necessary. While according to Imam Malik and Auza'i this sentence is only for the free male youth. Not for women, because women are *aurat* that must be hidden / covered. Imam Syafi'i and Imam Ahmad bin Hanbal argued that lashing is carried out together with one year of exile [17].

While the punishment for those who commit adultery while they are already married is explained in many *hadis*. 'Umar ibn Khathab reminded that "Allah has sent Muhammad with *Haq* and the scriptures. One that is revealed is the verse about the obligation to stoning (throwing adulterers who have married to death). We have read the verse and understood it, and the Prophet even has stoned, and we have too. I am worried that if in a sustainable period, there are people who say: 'We do not find the law of stoning in the book of Allah, so he is misguided by ignoring the obligations set by God. Indeed the law of stoning is the right imposed on those men and women who commit adultery if they have married, if the evidence is upright or the pregnancy is along with the confession. For Allah's

sake, if not for the fear that people say: ‘Umar added something in the Holy Qur'an’, I would have certainly written it. (Narrated by Bukhari, Muslim, Abu Daud and others) [18].

The verse referred to by Sayyidina ‘Umar ra. that has ever descended is:

الشيخ والشيخة إذا زنيا فارجموهما البتة بما قضيا من اللذة

“Married men and married women, if they commit adultery, then stone them for sure, because they have achieved delicacy (illegally) (Narrated by Ibn Hibban through Ubayy Ibn Ka'ab)”

The above hadith is a verse from the Qur'an which accepts *nasakh tilawah* but the law still applies. According to the *jumhur ulama*, this is permissible. Because one of the *nasakh* forms is *nasakh tilawah* while the law is still valid [19].

Departing from the phenomena and data obtained in the field, it can be seen that marriages by pregnancy are an adultery disease that is symptomatic in the community, which should get people's attention, as Sayyid Sabiq stated that adultery is an act that causes great damage. It is scientifically judged that adultery is one of the dominant causes of damage and destruction of civilization, transmit very dangerous diseases, encourage people to continue to live single lives and live together without marriage [20].

The legal basis for the implementation of marriages by pregnancy in Indonesia is article 53 of the Compilation of Islamic Law:

1. A pregnant woman out of marriage can be married to a man who impregnates her.
2. Marriage with a pregnant woman referred to in verse (1) can be held without waiting for the birth of her child first
3. With the marriage being carried out when the woman is pregnant, no remarriage is needed after the child is born.

In addition, in the Al-Qur'an there is no prohibition of the marriage of pregnant women with men who impregnate them, as Allah's firman in S. Al-Nur: 3:

الرَّانِي لَا يَنْكِحُ إِلَّا زَانِيَةً أَوْ مُشْرِكَةً وَالزَّانِيَةُ لَا يَنْكِحُهَا إِلَّا زَانٍ أَوْ مُشْرِكٌ
وَحُرِّمَ ذَلِكَ عَلَى الْمُؤْمِنِينَ

“The fornicator does not marry except a [female] fornicator or polytheist, and none marries her except a fornicator or a polytheist, and that has been made unlawful to the believers.”

Based on the verse above, Ibn Abbas, a friend of the Prophet, stated that the relationship between two sexes which was not preceded by a legal marriage, then a legal marriage is carried out, it makes the previous *haram* relationship to be *halal*. In other words, the marriage of someone who has committed adultery with a woman and then married her legally is like the situation of someone who stole fruit in someone's garden, and then he bought all the gardens and fruit legally. What was stolen before was *haram*, what he buys after the theft is *halal* [21]. This is the opinion adopted by Imam Syafi'i and Imam Abu Hanifah which were also adopted by the Compilation of Islamic Law. While Imam Malik argued that those who commit adultery must wait until giving birth and the end of the *iddah* period before she gets married. If they are married then it is not valid, unless it is repeated with a new marriage after giving birth and undergoing the *iddah* period.

The existence of article 53 of KHI aims to protect women and children to get their rights, children who have been in the womb of the woman get the rights from their biological fathers, to keep

the *murū'ah* of the women and children who will be born to the social life. This side is a benefit that can be drawn from the existence of this article.

The punishment given to the perpetrators of adultery, in *maqasid* is to maintain the offspring [22]. Maintaining offspring is one of the five main aspects that must be maintained by human at the *dharuriyah* level. To safeguard this, Allah forbids adultery and Allah commands marriage. Because only the marriage contract that can maintain the offspring and the status of the children born due to the marriage is considered as legitimate.

If the cases of marriage by pregnancy in Indonesia are observed, it is very clear that adultery has occurred. The solution is only found in article 53 of the Compilation of Islamic Law. While other punishments against adultery is almost none, although from the results of the study there is one *nagari* that applies customary punishments such as in the *Nagari Koto Tuo* Sungai Tarab Sub-district. It feels very sad that in the district of customary center, and the philosophy hold is *adat basandi syara'*, *syara*, *basandi Kitabullah*, but adultery seems to be rampant. The two forms of adultery revealed by Sayyidina Ali ra. could be said rife. Perhaps ones that are accurately recorded are only those who are pregnant. This happens by several factors as mentioned above.

The existing law should bring benefits to the people, but in reality the harm occurs. According to the author, if this condition continues, what will happen to our generation in ten years from now? Because based on the results of an interview with the head of the Religious Affairs Office, averagely 75% of couples who want to get married have had marital relations before marriage. Anticipatory actions and solutions implemented in the Office of Religious Affairs has not been effective in reducing the rate of marriages by pregnancy. Meanwhile, for those who do pre-marital relationships but not pregnant, there is no punishment. It was just a confession before getting married, like a short moment of shame, after that it just passed. Thus it can be concluded that *maqasidal-sharia* of the law has not been achieved so that the solutions that must be done are as follow:

1. In order to cover the way or as the preventive actions for the occurrence of a marriage by pregnancy or premarital relationship, a marriage by pregnancy should be prohibited, as Imam Malik explained. Because it feels as if marriage is as the solution if there is a pregnancy due to pre-marital relations. Although both the positive and negative sides are equally dominant, as a punishment it is considered enough to give a deterrent effect, even though the negative side is that women are more disadvantaged on this. It is because suffering and shame because of pregnancy out of marriage are only borne by the woman, while men do not get any punishments. But it is interesting to look at the interpretation given by Quraish Shihab, why in the verse about the prohibition of adultery, the female adulterers are mentioned before male adulterers. It is not only because the evidence of adultery is apparent to women (pregnancy), but also because it seems that a woman's fault here is a multiple mistake even though both are guilty and such mistake cannot occur without the involvement and willingness of both parties. It is known that adultery does not occur except it is hidden far beyond human view. This is the woman's first mistake. A woman, moreover unmarried one, is not allowed by religion to be in lonely places except with her *mahram* (her family) [23]. If this can be implemented, of course, all people will think twice to commit adultery.

2. if it is not easy to prohibit marriages by pregnancy, perhaps *Minang* community at the local level in *Nagari* can set customary punishments through *Nagari* People's Consultative Assembly. Maybe we cannot apply Islamic law in our beloved country, Indonesia, but it is possible to give *ta'zir* punishment. Every *nagari* which gets a report about adulterers, proven to be pregnant or not, they can be sentenced to customary punishment. So that perhaps on this aspect the two parties are equally punished. Thus, the benefit in order to maintain offspring can be achieved. Because if there is no action that we do today, what about the status of the children who will be the part of the leaders in the future. But this is certainly an agreement for all villages in Tanah Datar. And indeed the application of customary law is regardless of who do it and the relationship of the people.

3. This rule should be determined by the power holders in this Regency. It is because for the establishment of a regulation, there needs to be power. There should be rules for the enforcement of *nagari* regulations to anticipate premarital relations which is one of the dominant factors that destroy civilization and transmit dangerous diseases.

Adulterers in the Qur`an are indeed threatened with a very heavy threat, because indeed adultery is forbidden in order to maintain offspring. The severity of the punishment is set to give deterrent effect on the perpetrators and others. And perhaps if we have not been able to apply Islamic law because the principle of our country is *Pancasila*, we can minimally do punishment in the form of *ta'zir*. And it is hoped that the punishment is severe and has a deterrent effect so that the purpose of the law to obtain benefit and reject the harm can be achieved.

Discussion

The renewal of Islamic family law is an effort to harmonize the understanding and application of Islamic teachings of law with modernity and changes that occur in the Islamic countries in the world while still based on the spirit of the Islamic law teachings. The purpose of reforming Islamic Family Law in general can be grouped into: Unifying marital law, increasing the status of women, responding to developments and demands of the times, providing legal certainty for marital problems and becoming the judge's guidance [24].

One of the efforts to renew family law in Indonesia is marriages by pregnancy. In classical *fiqh*, there is no definite provision (controversy) about marriages by pregnancy. In the Compilation of Islamic Law Article 53 verse 1, 2 and 3, it is affirmed that pregnant women can be married to men who impregnate them without having to wait for the birth of the child, and do not need postnatal remarriage. Furthermore, marriages by pregnancy problems in Indonesia are only included in civil law.

In contrast to Malaysia, in some areas the problem of marriages by pregnancy or known as pregnancy outside marriage is included in the criminal category. As in the states of Perlis, Pahang, Melaka, Negeri sembilan, Perak, Kelantan, and Sabah in *Jinayah Syariah* Crime Enactment, it is stated that women who are pregnant outside marriage, or married but give birth less than six months are categorized as adultery and subject to criminal punishment in the form of confinement and penalties [24]. However, for those who are pregnant outside marriage in Trengganu Malaysia, they are allowed to marry as an ordinary marriage. This means that the woman may marry a man who impregnates her and the one who does not impregnate her [25].

In Brunei Darussalam, it is not much different from in Malaysia, marriages by pregnancy are included in adultery which are subject to *hudud* punishment. The marriage is the same as an ordinary marriage, but the adultery is sanctioned. And this is in line with the opinion of Syafi'i, that there is no difference between marriages by pregnancy with the ordinary marriages. [26]

Reflecting on Malaysia and Brunei Darussalam which categorize marriages by pregnancy into criminal matters that lead to punishments, Indonesia which has not applied Islamic criminal law should do preventive actions in order to reduce the number of marriages by pregnancy. It is also recommended to establish regional regulations which provide preventive *ta'zir* punishments as a form of reconstruction of the marriages by pregnancy provisions. And if possible, there is an amendment to the Compilation of Islamic Law by applying the opinion of Imam Malik and Imam Ahmad bin Hanbal as an effort to prevent the increase of marriages by pregnancy.

Conclusion

From the explanation above, it can be concluded based on the phenomena that marriages by pregnancy continue to occur, it seems that article 53 is a solution for the couples of marriages by pregnancy. Thus, the objective of the law that is to give benefit and refuse the harm is not achieved anymore. This needs special attention, even though article 53 of the Compilation of Islamic Law has not been amended, and of course this will go through a process, but perhaps a *ta'zir* punishment can be set through *nagari* or local regulations.

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